

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

APR 23 2004

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PHOENIX AVATAR, LLC doing business
as AVATAR NUTRITION,

DJL, LLC,

DANIEL J. LIN,

MARK M. SADEK,

JAMES LIN, and

CHRISTOPHER M. CHUNG
doing business as A I T HERBAL
MARKETING,

Defendants.

JUDGE HOLDERMAN

MAGISTRATE JUDGE SCHENKIER

Case No.

04C 28 97

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission"), for its Complaint alleges as follows:

1. The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, to obtain preliminary and permanent injunctive relief, rescission of contracts, restitution, redress, disgorgement and other equitable relief for Defendants' deceptive and unfair acts or practices and the making of false

advertisements in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and for violations of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701 *et seq.*

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 52 and 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.
3. Venue in the United States District Court for the Northern District of Illinois is proper under 15 U.S.C. § 53(b).

PLAINTIFF

4. Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC is charged, *inter alia*, with enforcing Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which prohibit, respectively, unfair or deceptive acts or practices, and false advertisements for food, drugs, devices or cosmetics in or affecting commerce. The FTC is also charged with enforcing CAN-SPAM as if statutory violations of CAN-SPAM “were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).” *See* 15 U.S.C. § 7706(a).
5. Section 13(b) of the FTC Act authorizes the FTC to initiate federal district court proceedings, in its own name by its designated attorneys, to enjoin violations of any provision of law enforced by the FTC Act, and to secure such equitable relief as may be appropriate in each case, including redress, restitution and disgorgement. 15 U.S.C. § 53(b).

DEFENDANTS

6. Defendant Phoenix Avatar, LLC, is a limited liability company registered in Nevada. Phoenix Avatar has a registered office at 4535 W. Sahara Avenue, Suite 217, Las Vegas, Nevada 89102.
7. Defendant DJL, LLC, is a limited liability company registered in Michigan. DJL has a registered office at 1350 Chapman, Birmingham, MI 48009.
8. At all times material to this Complaint, acting alone or in concert with others, Defendant Daniel J. Lin has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint.
9. At all times material to this Complaint, acting alone or in concert with others, Defendant Mark M. Sadek has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint.
10. At all times material to this Complaint, acting alone or in concert with others, Defendant James Lin has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint.
11. At all times material to this Complaint, acting alone or in concert with others, Defendant Christopher M. Chung has formulated, directed, controlled, or participated in the acts or practices set forth in this Complaint. Chung has registered the fictitious business name A I T Herbal Marketing in Michigan, and does business under that name.
12. "Defendants" means Phoenix Avatar, LLC, DJL, LLC, Daniel J. Lin, Mark M. Sadek, James Lin, and Christopher M. Chung. Defendants have transacted business in the Northern

District of Illinois within the meaning of 15 U.S.C. § 53(b). Defendants have operated as a common enterprise to advertise, market and sell products over the Internet.

COMMERCE

13. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFINITIONS

14. **“Header information”** means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.
15. **“Initiate,”** when used with respect to a commercial e-mail message, means to originate or transmit such message or to procure the origination or transmission of such message.
16. **“Procure,”** when used with respect to the initiation of a commercial e-mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.

DEFENDANTS’ BUSINESS ACTIVITIES

17. Since at least October 2003 and continuing to the present, Defendants have marketed a variety of herbal supplement products. These products have included the Med Diet Patch, Slim Form Diet Patch and Premium Diet Patch (the “diet patches”). The diet patches, which claim to contain fucus vesiculosus, are purported to cause substantial weight loss through, among other means, suppressing appetite and boosting metabolism.

18. Defendants have advertised, offered for sale, sold and/or distributed diet patches throughout the United States via dozens of Internet Web sites. Some of the Web sites Defendants have used to market their diet patches and other herbal supplements are: www.seeitnowquickly.net; www.countupandlookaway.com; www.keepyourmatchappy.biz and www.cisetefuts.com. Consumers may purchase Defendants' products by credit card from Defendants' Web sites.
19. Defendants have advertised a Med Diet Patch on their Web sites. To induce consumers to purchase their diet patch, Defendants' Web sites touting the Med Diet Patch contained the following statements:

**LOSE WEIGHT THE EASIER WAY
IT'S NOT A DIET... IT'S A PATCH**

Med Diet Patch is a cutting-edge, advanced appetite suppressant, metabolism booster, and energy enhancer ...all in one! With Med Diet Patch, there are no more starvation diets and no difficult and dangerous exercises!

Just place a new adhesive skin patch anywhere on your body, each day for continuous, safe, and effective weight loss. Much like a Nicotine Patch takes away your craving for cigarettes, Med Diet Patch drastically reduces your cravings for food, so you naturally do not want to over-eat. While at the same time, Med Diet Patch is boosting your energy level, and jump-starting your metabolism to burn maximum body fat.

Amazingly, weight-loss is only one of the many benefits associated with the ingredients in Med Diet Patch's proprietary blend! Regular use of Med Diet Patch will nourish your muscles, remove toxins, and even reduce cholesterol levels; just to name a few!

* * *

Quick Facts:

- Controls your appetite.
- Stimulates your metabolism.
- Controls balance in producing hormones (essential to weight loss).
- Eliminates active toxins.

- **Helps fight water retention with potassium.**
- **Increases overall energy.**

20. Defendants have advertised a Slim Form Diet Patch on their Web sites. To induce consumers to purchase their diet patch, Defendants' Web sites touting the Slim Form Diet Patch contained the following statements:

Eat Normally

Forget about those horrible diets [sic] with slim form patch you can eat your favorite foods but less of it.

Slim Form Patch is a "steady" weight loss system. This means you lose fat. While the patch is working hard to turn fat into toned muscle, you can eat normally....without dieting.

* * *

The SFP is so easy to use [sic] just peel and stick then watch the pounds melt away.

* * *

Slim Form Patch helps to keep you healthy and trim!

This revolutionary new diet patch will peel off the pounds each time you peel off the patch. Non-invasive safe and easy to use, this patch guarantees weight loss with dramatic results. Slim form patch also increases energy while decreasing food cravings and boosting metabolism for amazing weight loss.

* * *

Slim Form Patch works 24-hrs a day even while you are sleeping.

* * *

Q) How will Slim Form Patch help me lose weight?

A) Slim Form Patch works by controlling your appetite and food cravings. When you eat less you start automatically losing weight.

Q) How soon I will [sic] start losing weight with Slim Form Patch?

A) You will see results the first week. Slim Form Patch will usually control your appetite within 3 days, allowing you to lose weight right away. For some people it make [sic] take longer to activate the metabolism.

Q) How much weight will I lose with Slim Form Patch?

A) In recent laboratory studies results proved that most people lose from 2 to 4 lbs. per week. There have been cases reported of as much as 6-lbs. weight loss in one week.

21. Defendants have marketed their Web sites by initiating millions of commercial e-mail messages. The e-mail messages initiated by Defendants contain the Web site addresses of Defendants' Web sites as hyperlinks in the text of the e-mails. From January 1, 2004 through mid-March, consumers forwarded approximately 120,000 e-mails advertising Defendants' products to the FTC's spam database at uce@ftc.gov.
22. Commercial e-mail messages initiated by Defendants contain header information, including "from" and "reply-to" fields. The "from" field purports to identify who sent the e-mail; the "reply-to" field identifies to whom a return e-mail will be sent if the e-mail recipient clicks the "reply" button.
23. In numerous instances, commercial e-mail messages initiated by Defendants utilize header information that is materially false or materially misleading. In particular, commercial e-mail messages initiated by Defendants often contain an e-mail address or domain name of an unrelated third-party in the "reply-to" or "from" field of the e-mail without the third party's consent or authorization.
24. Innocent third parties whose e-mail addresses or domain names are placed in the "from" or "reply-to" field of commercial e-mail initiated by Defendants without their authorization often suffer injury. First, innocent parties whose e-mail addresses were placed in the "reply-to" field without their authorization often receive an unexpected influx of e-mail messages that were undeliverable as sent and "bounced" back to their e-mail address. In addition, consumers who receive commercial e-mail messages initiated by Defendants often reply and

complain about the e-mail with “return” e-mails, which are sent to the innocent party whose e-mail address was placed in the “reply-to” field of the outgoing e-mail. As a result, third parties whose e-mail addresses or domain names are placed in the “from” or “reply-to” line of commercial e-mail initiated by Defendants without their authorization also often suffer injury to their reputations by having themselves wrongfully affiliated with the sending of bulk unsolicited e-mail.

25. In numerous instances, commercial e-mail initiated by Defendants fails to provide clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender.
26. In numerous instances, commercial e-mail initiated by Defendants fails to provide a valid physical postal address of the sender.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

27. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or deceptive acts or practices in or affecting commerce. Section 12(a) of the FTC Act, 15 U.S.C. § 52(a), prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services or cosmetics. For the purpose of Section 12 of the FTC Act, the diet patches sold by Defendants are either “drugs” or “devices” as defined in 15 U.S.C. §§ 55(c) & (d).
28. As set forth below, Defendants have engaged in unlawful practices in violation of Sections 5(a) and 12 of the FTC Act in connection with the marketing and/or sale of their diet patches.

COUNT ONE

29. Through the means described in Paragraphs 18-21, Defendants have represented, expressly or by implication, that:
- a. Their diet patches cause substantial weight loss, including as much as six pounds per week; and
 - b. Their diet patches increase metabolism, decrease appetite, and reduce food cravings, thereby enabling users to lose substantial weight.
30. In truth and in fact:
- a. Defendants' diet patches do not cause substantial weight loss, including as much as six pounds per week; and
 - b. Defendants' diet patches do not increase metabolism, decrease appetite, or reduce food cravings, thereby enabling users to lose substantial weight.
31. Therefore, Defendants' representations as set forth in Paragraph 29 above are false or misleading and constitute a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT TWO

32. Through the means described in Paragraphs 18-21, Defendants have represented, expressly or by implication, that their diet patches enable users to lose substantial weight.
33. Defendants did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 32 above at the time the representation was made.

34. Therefore, the making of the representation set forth in Paragraph 32 above constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

**VIOLATIONS OF THE CONTROLLING THE ASSAULT OF
NON-SOLICITED PORNOGRAPHIC AND MARKETING ACT OF 2003**

35. The Controlling The Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701 *et seq.*, became effective on January 1, 2004, and has since remained in full force and effect.

36. Section 5(a)(1) of CAN-SPAM states:

It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message . . . that contains, or is accompanied by, header information that is materially false or materially misleading.

15 U.S.C. § 7704(a)(1).

37. Section 5(a)(6) of CAN-SPAM states:

For purposes of [section 5(a)(1)], the term “materially,” when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service, processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who investigated the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.

38. Section 5(a)(5)(A) of CAN-SPAM states:

It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides:

- (i) clear and conspicuous identification that the message is an advertisement or solicitation;

(ii) clear and conspicuous notice of the opportunity under [section 5(a)(3)] to decline to receive further commercial electronic mail messages from the sender; and

(iii) a valid physical postal address of the sender.

15 U.S.C. § 7704(a)(5)(A).

39. Section 7(a) of CAN-SPAM states:

[T]his Act shall be enforced by the [FTC] as if the violation of this Act were an unfair or deceptive act or practice proscribed under section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).

15 U.S.C. § 7706(a).

COUNT III

40. In numerous instances, Defendants have initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading.

41. Defendants' acts or practices, as described in paragraph 40 violate 15 U.S.C. § 7704(a)(1).

COUNT IV

42. In numerous instances, Defendants have initiated the transmission of commercial e-mail messages to protected computers that fail to provide:

a. clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and/or

b. a valid physical postal address of the sender.

43. Defendants' acts or practices, as described in paragraph 42, violate 15 U.S.C. § 7704(a)(5).

CONSUMER INJURY

44. Consumers throughout the United States have suffered, and continue to suffer, substantial monetary loss as a result of Defendants' unlawful acts or practices. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

45. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other relief, including redress, disgorgement, and restitution, to prevent and remedy violations of any provision of law enforced by the FTC.
46. This Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by Defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), Section 7(a) of CAN-SPAM, 15 U.S.C. § 7706(a), and the Court's own equitable powers, requests that the Court:

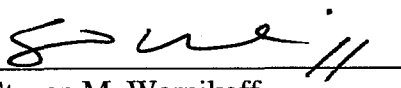
1. Award Plaintiff such preliminary and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action, and to preserve the possibility of effective final relief;
2. Permanently enjoin Defendants from violating the FTC Act and CAN-SPAM, as alleged herein;

3. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and CAN-SPAM, including, but not limited to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten monies; and
4. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: April 23, 2004

Respectfully submitted,

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